

Trade Bill: Committee Stage

Submission by Nick Ashton-Hart (Oral Witness)

23rd January 2018

My comments as an Oral Witness, and this written submission provided for the Committee as an aid to my appearance, is made solely in my personal capacity.

Introduction

1. I have been involved in multilateral negotiations since the 1990s, and a part of the Geneva international community since 2001. From 2012-2016 I was the only full-time representative from the tech sector to the IGOs and WTO delegations in Geneva. Prior to that I worked at the Internet Corporation for Assigned Names and Numbers, Inc. (ICANN) facilitating the participation of the public worldwide in the global processes for policy development for the Internet's addressing systems; this gave me an inside view of how important process is to the legitimacy of the results of policy development.
2. As it relates to the Trade Bill, I now consult on trade policy for the private sector, member-states, and at times UN agencies, particularly on services and the digital economy. You can find my CV online at <https://www.linkedin.com/in/ashtonhart/> including links to writing I've done on trade over the course of time.
3. My job entails routinely working with trade Ministers and Ambassadors of countries worldwide so I'm familiar with how they view their national trade policy development processes, the way they evaluate and prosecute negotiations with their partners, the significance they attach to consultation and oversight, and the politically heavy 'lift' that trade agreements have. The countries I work with include the UK's major trading partners in Europe and elsewhere.

Summary of Main Points

4. The logical premise underlying this Bill's conception of how to go about creating the foundation of our independent trade relationship with the world is contrary to what I know of how trade policy works, in three major areas:
 - 4.1. The underlying idea is that dozens of economies will agree to give the benefits of their economic relations with the world's largest trading area of 28 countries to the UK *by itself* with minimal or no negotiations;
 - 4.2. There is no provision in the Bill to review the dozens of agreements the Government proposes to replicate to determine whether *we ourselves* should seek changes based on our economic interests, despite the fact that these new agreements are to serve one country's interests, and not the 13, 15, or 28 economies they were negotiated to serve;

- 4.3. The Bill's explanatory memoranda acknowledge that these agreements may not be simple replications. Despite that it does not propose any meaningful discussion in society, with industry or any process of Parliamentary oversight for any part of them, despite using Henry VIII powers to bring them into force in some areas.

Detailed Comments

5. Part of the reason trade agreements take so long to conclude is because of the political cost to bring stakeholders on board - and keep them there.
6. The rationale that the Government has posited fundamentally misunderstands how negotiations work and then makes assumptions based on that rationale which is, in my experience, equally unsound:
 - 6.1. **It relies upon the assumption that all 60+ parties to agreements with the EU will agree to exactly the same terms for the UK by itself.** Do any of us make a major purchase - a house, or a car - without trying to negotiate on price? If we were to purchase 10 major items like these, wouldn't we expect - and seek - an even bigger discount? The incentive to negotiate increases as the stakes increase: trade negotiators have to persuade their constituencies that they got the best deal possible. The more important a trading partner is to us, the greater its incentive to ask for improved terms. If the shoe were on the other foot, would we agree a deal without asking for better terms? No.
 - 6.2. **Assuming that the replication of each of these agreements is beneficial for the UK without detailed analysis would be unwise.** These deals were a compromise within the EU, with the UK advocating for its interests alongside those of all other EU members, and then between the EU *en bloc* and the counterparties. Some are decades old. The Government should be doing a comprehensive review of these agreements' value to us now before seeking to replicate them. In any other advanced democracy the review itself would involve stakeholders and the review itself would be published. Have these been done, and if so, when can Parliament and the public see them?
7. **There are fundamental problems with the Government's position that effectively no consultation with anyone, or active consent by Parliament, is needed:**
 - 7.1. According to paragraph 46 of "Delegated Powers – Memorandum By The Department For International Trade"¹ the powers in clauses 2(1) and 3 are

¹ Accessible publicly at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/Trade-Bill->

“... broad enough to allow implementation of substantial amendments, including new obligations.” The immediately following paragraph states that the powers may be used only in two scenarios. Neither of those scenarios covers materially different or new obligations, except where they would not result in a material difference to the effect of the agreement as a whole compared to the original deal. All very well: but what happens if a provision doesn't fit those scenarios? There's no recognition of the need for a process of consultation or oversight. So, how are agreements with non-status-quo preserving terms to enter into force other than that for status-quo terms? I emphasise that clause 2(1) of the Bill contains a Henry VIII power - again according to the Government in the above-referenced document.

7.2. The situation under which the source agreements were made is materially different than the economic and political conditions now prevailing, and they are new binding legal agreements irrespective of the contents. I submit that content alone does not determine whether oversight and consultation is required of a new international obligation in a modern democracy in the Internet age. The context in which it is being adopted and the purposes for the same matter as well.

8. There are other problems with the Bill's conception of how to go about the replacement of EU agreements:

8.1. The Government's assumption that it can replicate these dozens of deals in good time before we are no longer covered by the EU equivalents suggests a speed of negotiations which has not been matched at any other time by any other country or group of countries.

As we have seen in the past week, it is a point of negotiation between the EU and us as to whether we will have access to the terms of these agreements beyond March 2019 and when we may bring successor arrangements into force. I've no doubt that major trading partners of the UK and the EU will not finalize arrangements with us until we've finalized arrangements with the EU as the latter can significantly impact on the value proposition of the former.

8.2. The Government has not explained how the counterparties to these dozens of agreements will have sufficient time to go through their national approval processes so that these agreements enter into force in good time. On what basis does this implicit assumption rest? If an analysis has been done of the time horizons required by these dozens of countries internally to consent to be bound by a new agreement it should be published. If it has not been done, it should be done urgently, and then published. The analysis would also have to 'work backwards' based upon

the date we need these successor agreements to enter into force, so Parliament and stakeholders can clearly see when negotiations with each would need to conclude.

Consultation Issues

9. Simply put, any review of public discourse on trade policy makes clear: **transparency of negotiations is increasing because, without it, the public won't wear major new agreements.** This was true before populism became as electable as it is now; it has gotten only worse.
10. When TTIP was under active negotiation it faced increasing headwinds even before the election of Donald Trump. There were mass protests in many European countries due to fears about what might be agreed, even where the negotiating mandate of the EU clearly stated that a particular controversial issue would not be included. It was also widely known that the EU Parliament had to agree with the final text and was being consulted as the negotiations proceeded. In the UK we had popular anger over the idea that the procurement processes of the NHS might be impacted by TTIP. A previous agreement, ACTA, was abandoned by the EU after it was concluded due to popular protests.
11. Does the Government - do we - actually believe that dozens of agreements being negotiated without consultation or real Parliamentary oversight will produce no public concern? If the Government does, then it is making an assumption that is completely contrary to all experience in every other country - including ours.
12. The Bill suggests that it is possible to negotiate, agree, and bring into force dozens of trade agreements in record time. It is understandable: if the UK really does exit the EU in March 2019, even with a transition period lasting single-digit years, replacing all these arrangements to avoid a cliff edge is an incredible challenge. However, the need for speed does not mean that we can forgo any consultation on these agreements even if, as the Government suggests, it can get dozens of countries to agree to replicate their EU deals with the UK. Aside from the democratic legitimacy issue, aside from the question of if the public will actually wear this, there are two other fundamental issues:
 - 12.1. Our negotiating partners will ask for changes in their interest. Maybe not all of them, but all the important ones will, and;
 - 12.2. Strategic leaking of text during negotiations is a key part of the negotiation process.
 - 12.2.1. **On the first:** Why can I state so definitively that there will be changes? Firstly because, as I've stated above, the way humans negotiate and their motivations as officials guarantees that to be the case. Secondly, because it has already started: When the UK and the EU proposed to our trading partners how we would 'split up' agricultural quotas (called "TRQs") there were immediate objections

from our closest allies and trading partners outside the EU. This was widely reported on so I won't go into detail, but it makes the point very clearly: we should make the safe assumption that if this happened in the very first negotiation with our trading partners, it won't be the last time it does. This Bill, unfortunately, is premised on the opposite being true.

12.2.2. The changes counterparties propose, and which our negotiators ultimately agree, will have impacts upon our economy and society. To evaluate those impacts, industry, trade unions, and society will need to be asked for input because they have the expertise to evaluate the impact of different potential outcomes.

12.2.3. **On the second:** Draft agreements invariably leak - often multiple times in each negotiation. There's a reason why: trade negotiators know if a negotiation isn't going the way they want, creating political pressure on the other side through a leak of negotiating positions is a great way to force concessions. Getting concessions is their job. Our officials would (and will) do the same.

12.2.4. A robust consultation and oversight process therefore helps protect our trade negotiators: if the consultation and oversight process is sufficiently robust to help insulate negotiators from sudden public disclosure of negotiating positions - like those created by strategic leaking - they have less incentive to use these tactics. The reverse, of course, is also true.

12.2.5. Robust oversight and consultation processes aren't just necessary for legitimate outcomes in a democratic society, and for the above pragmatic reasons: They add real value in negotiations through better information on policy options' likely intended - and unintended - consequences. The majority of the expertise in any economic sector in an advanced economy is in the private sector, academia, and civil society, not Government. Consultation allows that expertise to be leveraged.

13. Finally, on the democracy deficit issue: I have personally watched, many times, great policy outcomes frustrated or entirely ruined by process failures - and sometimes not even a failure of process but of the perception of one. This Bill's lack of consultation practically begs for problems: objections to the provisions of an agreement cannot be avoided simply by the Government of the day arguing it is a replacement of an existing provision. The next question that will be asked is: why aren't you asking for something better - and why aren't you asking [insert constituency here] for advice?
14. The need for speed to create successor agreements is real. Falling back on the WTO rules is not an option: literally no country in the world trades on WTO rules alone, all have negotiated or concessionary better terms. Lack of

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consultation and oversight is not the answer to the lack of time; effective, expeditious, and robust consultation and oversight is. That may sound counterintuitive but Members of the House will all be able to think of any number of times where the perception of lack of review led to delays in the legislative process, or in the process of promulgating policy outcomes in Government.

15. What we definitely don't time for is to get any of this process wrong.